

BEFORE THE FEDERAL ELECTION COMMISSION

IN RE: Jeff Denham and )  
Denham for Congress Committee )  
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 )

MUR 6289  
Response To Complaint

OFFICE OF GENERAL

2010 JUL - 7

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In accordance with 2 U.S.C. §437g(a), Jeff Denham (Denham) and the Denham for Congress Committee (DCC), (collectively "Respondents") file this response to a complaint file by Sean Fox alleging that Respondents coordinated a public communication with the Picayune Rancheria of Chukchansi Indians (Chukchansi) which constituted a violation of the "electioneering" provisions of the Federal Election Commission Regulations ("Complaint"). For the reasons set forth below, Respondents request that the Federal Election Commission ("Commission" or "FEC") make a finding of "no reason to believe" and close the file.

I FACTUAL SUMMARY

The Complaint sets out very few facts other than the general allegation that, "The Denham campaign fully coordinated with the Picayune Rancheria of Chukchansi Indians (i.e., their actions meet the test in 11 CFR 109.21) on an "electioneering communication" television and radio ad buy costing between \$100,000 and \$200,000. The ads are running consistently in the Fresno, CA market."<sup>1</sup> The Complaint also attaches copies of the radio and TV script of the advertisement in which Denham appears and speaks.<sup>2</sup> As will be noted below, these facts, as set forth in the Complaint, are inaccurate

Jeff Denham is currently a California state Senator and was a candidate for the Republican nomination for the 19<sup>th</sup> Congressional District in California.<sup>3</sup> In his capacity as a state Senator, Denham is currently serving as Chairman of the State Senate Veterans Committee and he is also a veteran, having served in the United States Air Force.

Denham was also a primary candidate for the Republican Party nomination for the 19<sup>th</sup> Congressional District in California, the election for which was held June 8, 2010. Denham won that primary election and will be the Republican Party candidate on the November 2, 2010 general election ballot in California.

Through statute enacted by the California legislature, the California Department of Veterans Affairs (DVA) was directed to administer the "Gold Star Family License Plate"

<sup>1</sup> See p. 1 of Complaint

<sup>2</sup> See attachment of Complaint.

<sup>3</sup> Denham won the primary election and is a candidate on the November 2, 2010 general election for the 19<sup>th</sup> C.D. in California.

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project, (Project)<sup>4</sup> which included securing private donations in the amount of \$300,000 to implement the Project. In an effort to assist with this fundraising goal, Remembering The Brave, (RB) a not-for-profit public charity, exempt pursuant to IRC § 501(c)(3) sponsored a benefit concert, the proceeds of which were donated to the Project to help meet the DVA fundraising goal. The concert was held at the Chukchansi Gold Resort & Casino, Coarsegold, California<sup>5</sup> on May 28, 2010 and featured country and western star Phil Vassar (Event).

As part of the promotion to sell tickets to the Event, RB produced and aired radio, television and internet advertisements (Ad). As noted in the Ad's disclaimers, these were paid for by RB, not the Pinyone Rancheria of Chukchansi Indians, as is alleged in the Complaint. The radio and television Ads aired in a close geographic proximity to the Gold Resort & Casino, in an attempt to entice people attend the Event.<sup>6</sup>

In light of his long standing association with veterans' issues and the Gold Star Project legislation, Senator Denham was requested by RB to act as the spokesman and to appear in the Ad for the Event.

In the Ad, Denham is only identified as "Senator Jeff Denham" and his comments are strictly confined to the promotion of Gold Star and the Event; there was neither any reference to an election, nor to Denham's candidacy for the U.S. Congress, the election, his opponents or political parties.

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<sup>4</sup> "World War I mothers of sons and daughters in service displayed a Blue Star flag with both pride and concern...knowing their children were in harm's way. The Blue Star represented both their pride, and their hope. A large part of the Blue Star program was to initiate whatever efforts they could to some day bring their children safely home.

When the war began claiming the lives of many of young Americans, a new flag developed. When a son or daughter was killed in action a gold star was sewn over the blue one, completely covering it. In May 1918, the Women's Committee of National Defense suggested to President Woodrow Wilson that those mothers who had lost a family member in the war should wear a black band on their upper-left arm, adorned with a gold star. In a letter affirming his support for this proposal, President Wilson referred to these women as "Gold Star Mothers." It was the beginning a new tradition of patriotic support for those who serve our Nation in uniform. On September 26, 2008 Governor Schwarzenegger signed SB 1435 - the Gold Star Family License Plate bill - authored by Senator Dave Cogdill (Modesto). This bill authorizes the California Department of Veterans Affairs to sponsor a Gold Star Family specialized license plate program and waives the 7,500 minimum applications requirement. This bill authorizes a family member of a member of the Armed Forces who was killed while serving on active duty in the military to apply for a special license plate with a design containing a Gold Star and the words "Gold Star Family."

The Gold Star Family License Plates will be produced at no cost to the state's General Fund, so fundraising will be necessary. The Department of Veterans Affairs is authorized to actively seek donations to pay for the costs of implementing the program (estimated to be \$300,000). So, the Department of Veterans Affairs has established Project Gold Star to help raise the necessary funds. All of the money collected by Project Gold Star will be deposited into the Gold Star Family License Plate Account created by SB 1435. Upon appropriation by the Legislature, these funds will be transferred to the Department of Motor Vehicles to cover their costs." See [www.cdva.ca.gov/vetfund/GoldStar.aspx](http://www.cdva.ca.gov/vetfund/GoldStar.aspx) May 6, 2010.

<sup>5</sup> Coarsegold, California is located approximately halfway between Fresno and Madera and to the East.

<sup>6</sup> The stations included KATM radio; KFSN ABC; KGPE CBS; KKBN radio; KMJ radio; KMPH Fox; KSEE radio; KUBS radio.

## II. LEGAL AND FACTUAL ARGUMENTS

### A. The content of the Ad fails to meet an express advocacy standard under the FEC Regulations.

Based upon the facts alleged in the Complaint, the Commission could assess the Ad to determine if it was in violation of the FECA, based upon the "electioneering" provisions of the Regulations or based upon an express advocacy approach. For purposes of responding thoroughly to the Complaint and thereby supporting a dismissal of this matter, each of the potential violations will be addressed in this response.

The most obvious place to commence the review is to first determine if the content of the Ad's was considered to be a communication "expressly advocating" the election or defeat of a federal candidate. The Regulations at 11 CFR §100.22 set out two standards upon which a communication could be considered to be one "expressly advocating" a candidate's election or defeat.

The first of the standards is met if the communication uses specific words that call to "vote for" a candidate's election or defeat.<sup>7</sup> A review of the Ad's text clearly indicates it does not meet this standard since neither words suggested in the regulation, such as "vote for" are included in the Ad nor is there even a reference to an election or a candidate.<sup>8</sup> Therefore, the Ad does not meet the criteria for the first standard of "expressly advocating".

The second standard in the regulation states in essence that when taken as a whole with limited reference to external events, the communication could only be interpreted by a reasonable person as containing advocacy of the election or defeat of a clearly identified candidate because, (1) the electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning; and (2) reasonable minds could not differ as to whether it encourages action to elect or defeat a clearly identified candidate.<sup>9</sup>

The Ad is void of any reference to a candidate, an election, support or opposition to any candidate, institution, political party. Deaham is identified as a State Senator not as a candidate for federal office. Deaham's comments and the content of the entire Ad solely pertain to the Event and support of the Gold Star Project. There is not even an "electoral portion" of the Ad to consider. In this case, it is unmistakable, unambiguous and suggestive of only one meaning in the mind of any reasonable person; the Ad does not encourage the election or defeat of a candidate, but rather it merely advocates supports for the Event in an effort to support the Gold Star Project.

For these reasons, it is abundantly clear and without argument that the Ad does not come close to meeting the "expressly advocating" standards as set forth in the Regulations.

<sup>7</sup> 11 CFR §100.22(a) (2010)

<sup>8</sup> See text of Ad at attachment

<sup>9</sup> 11 CFR §100.22(b)

- B. In light of the Supreme Court's recent opinion, the Ad does not constitute an "electioneering communication" since it is neither express advocacy nor the functional equivalent to express advocacy.

The Complaint alleges that the Ad was an "electioneering communication" that was coordinated between the Chukchansi and the Denham Committee and because of that coordination constituted a violation of the Regulations. For the reasons stated below, the AD does not constitute an "electioneering communication" and therefore was not in violation of the Regulations.

The definition of the term "electioneering communication" is rather extensive against which numerous facts must be assessed. For purposes of this argument however, the Respondent will acknowledge the relevant facts and focus its argument on the points of law which preclude this Ad from being considered an electioneering communication.

The Respondents acknowledge, the Ad was paid for by a not-for-profit corporation, namely, Remembering the Brave and was transmitted by radio, television and through the internet. The radio version of the Ad contained the voice and identification of Denham as a State Senator; the television version contained footage and images of Denham and again he was identified as State Senator Denham, not as a candidate for federal office. The Ad aired during the month of May, up until the May 28<sup>th</sup> date of the Event, which obviously came within the thirty (30) day time period prior to the California primary election for which Denham appeared as a candidate for the Republican nomination for the 19<sup>th</sup> Congressional District. The Ad aired over a geographic area that was within the vicinity of the Gold Resort and Casino at which the Event was to be held. This geographic area included Denham's state senate district, the 19<sup>th</sup> Congressional District and areas beyond both of those electoral districts. The AD was received by more than 50,000 people within the 19<sup>th</sup> Congressional District.

With this all having been said, the current standard of review for determining if a communication constitutes an "electioneering communication" is set out in the U.S. Supreme Court's opinion in Federal Election Commission v Wisconsin Right to Life, Inc. 551 U.S. 449 (2007) (*Wisconsin*). As is the case in this matter, the allegations in *Wisconsin* pertained to an allegation that a communication constituted a prohibited electioneering communication because it was paid for with corporate funds referenced a U.S. Senator who was also a candidate at the time and it aired 30 days before an election. The question before the Court was whether such a communication came within the regulatory ambit of the FECA as an electioneering communication or was it a communication advocating support of an issue and therefore beyond the regulatory jurisdiction of the FECA.

In that opinion, the Court first acknowledges that advocacy may be regulated if it constitutes express advocacy or the functional equivalent of express advocacy. *Wisconsin*, *supra* at 11. As discussed above, the Ad fails to come within any

description of "express advocacy" as set forth in the Regulations. The question in this matter then turns on whether the Ad comes within the Court's definition of the "functional equivalent" of express advocacy.

To this issue, the Court clearly articulated the appropriate standard to apply; "...a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Wisconsin*, *supra* at 16. The Court, in applying this standard to the communications at issue in *Wisconsin*, found (1) the communications content was consistent with that of a genuine issue ad and (2) the content of the communication lacked any indicia of express advocacy. The ads did not mention an election, candidacy, political party, or challenger; and they did not take a position on a candidate's character, qualifications or fitness for office. *Wisconsin*, *supra* 18. Such should also be the finding of the Commission related to the Ad in this matter.

The text of the Ad pertains exclusively to the issue promoting the Event and the Gold Star Project. The text of Denham's comments relate solely to the sacrifices of the veterans and those who give their lives and whose families become "Gold Star" families. He then asks the listeners to join Remember the Brave for the benefit concert. Alternatively, if the listener could not attend, Denham directs them to the Remember the Brave website to learn more about the Project and to make a donation.

Recall also, that the Gold Star Project was the result of legislation enacted to develop the Gold Star license plate. In order to implement that legislation, it required securing private donations in the amount of \$300,000. Therefore, this Event and the publicity for the Event, including the Ad were linked to the legislative issue of supporting the Gold Star license plate Project.

It is without doubt that the entire text of the communication is focused solely on the issue of the Remember the Brave benefit Event. There is not a remote argument that the text of the Ad is anything but a genuine issue ad promoting the Event.

The Ad clearly falls within all provisions of the Court's announced second opinion; it does not contain any indicia of express advocacy; it does not mention an election, a candidacy, a political party or a Denham challenger. Obviously the announcer must introduce Denham to credential his comments, however that introduction and identification is not made in the context of him as a candidate but rather as Senator Jeff Denham, Chairman of the Veteran Affairs Committee. Reference to his Chairman status of the Veteran Affairs Committee is placed upon his status to comment and seek assistance for veterans. The Ad does not take a position on any candidate's character qualifications or fitness for office, in the positive or the negative.

Based upon those facts, the Ad does not approach fulfilling Court's criteria set out in *Wisconsin* to classify a communication as the functional equivalent of express advocacy.

C. Any attempt to imply that the purpose of the Ad was to influence the Denham election is misplaced and not to be considered.

The Court was abundantly clear in its opinion that only the substance of the communication should be considered when attempting to determine if it constitutes the functional equivalent of express advocacy. Any attempts to determine the underlying intent or the effect of the communication on a candidacy is misplaced and is not to be considered as part of the standard upon which the communication is to be reviewed.

The Court recognized the importance of the liberty to publicly discuss all matters of public concern without previous restraint or fear of subsequent punishment. *Wisconsin*, *supra* 15, citing to *Befort*, 435 U.S. at 776. In reference to this liberty interest, the Court stated the standard of review in such cases, "...must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." *Wisconsin*, *supra* 16, (citation omitted).

The rationale for this definitive standard was effectively stated by the Court; "Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad with the terms of §203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue." *Wisconsin*, *supra* 14.

The plain reading of the text of the Ad evinces only one conclusion; the Ad was produced and aired for the purpose of promoting the Event and to encourage people to attend the Event or to make a financial donation to support Remember the Brave and support the Gold Star legislation project. Based upon the definitive standard set out by the Court, any attempts by the Commission in this matter to attribute any other intent for the production and airing of the Ad is misplaced and has no relevancy for determining if the Ad is to be considered an electioneering communication.

D. The issue of the proximity of the dates the Ad aired to the date of the election is not a matter for consideration when assessing if the Ad constitutes the functional equivalent to express advocacy.

The question may arise in the mind of some as to why the Ad was aired in May in such close proximity to the June 8, 2010 California primary election date. The answer is quite simple; May 28<sup>th</sup> was Memorial Day, the date on which a wide array of veteran and military issues is brought to the public's attention. It is the single time of the year when the country, as a whole, is poised and sensitive to listen to veteran related issues and causes. Respondents neither set the date upon which Memorial Day would be recognized nor were they responsible for establishing the date of the California Primary election. It was common sense and marketing that determined the Event had to be held on or around the May 28<sup>th</sup> date. Correspondingly, the time during which the Ad would be aired was dictated by the date of the Event.

Putting aside the commonsense rationale for the time period during which the Ad was aired, the Court also address whether it was appropriate to consider timing of when a communication is aired for purposes of evaluating whether the communication was the functional equivalent of express advocacy. Once again, the Court addressed the issue in *Wisconsin* but dismissed it as *immaterial* to consider.

The factual case in *Wisconsin* related to the timing issue was a far more compelling to justify finding functional equivalent of express advocacy than are the facts in this matter. Yet the Court in *Wisconsin* dismissed even the consideration of the timing issue. In *Wisconsin* the ads were aired near the election not near the date of the actual Senate votes on judicial nominees, which is when one would suspect the ads to be most effective. In addition, the ads were not run after the election which is when the Senate vote was to occur. In this matter, the Ad was aired in close proximity to the Event and was not aired after the date of the Event, up to the date of the primary election, even though it would reasonably have done so in order to encourage donations following up from the concert and Event.

As to this timing issue, the Court stated that to raise the issue to evidence the subjective intent of the sponsors of the ad, it is irrelevant (as noted above) and for purposes of citing to it indicate the ad constitutes the equivalent of express advocacy, it fell short. The Court noted that if airing the ad close to the time of an election, "...were enough to prove that an ad is the functional equivalent of express advocacy, then BCRA would be constitutional in all of its applications. This Court unanimously rejected this contention in *WRTL 1*." *Wisconsin*, supra 19.

- E. The Court specifically admonished the use of discovery as a means to look behind the plain text of the communication at issue to determine if it constituted the functional equivalent of express advocacy, therefore the Commission should not make a reason to believe finding for purposes of launching discovery in this matter.

The stated purpose in the FECA for the Commission's finding of "reason to believe" is to authorize the commencement of an investigation into the facts surrounding the allegations of the complaint or those which naturally arise from that complaint. Such investigations may include interrogatories, depositions and subpoenas for testimony and documents. 2 U.S.C. 437g(a)(2).

In dealing with this type of issue, however, the *Wisconsin* Court has stated rather clearly that the determination of whether the communication constitutes the equivalent of express advocacy is to be determined by the plain reading of the actual text of the communication and not by exigent circumstances and or collateral facts in an attempt to evidence an attempt to influence an election by the use of the issue communication.

"Given the standard we have adopted for determining whether an ad is the "functional equivalent" of express advocacy, contentual factors of the sort invoked by appellants

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should seldom play a significant role in the inquiry. Courts need not ignore basic background information that may be necessary to put an ad in context...But the need to consider such background should not become an excuse for discovery or a broader inquiry of the sort we have just noted misses First Amendment concerns." *Wisconsin*, supra 20.

All of the facts which are necessary to determine if the Ad measures up to an electioneering communication are contained in this response brief; further discovery is not required in order to establish the text of the Ad and its linkage to the Event. Anything beyond those facts would delve into the areas which the Court has held to be irrelevant to the determination of whether it is the functional equivalent of express advocacy.

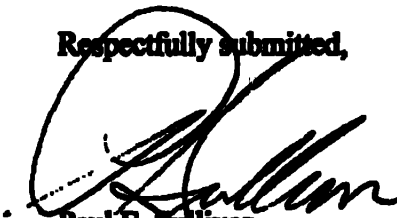
The purpose for making this point to the Commission is a practical one; the discovery process is an expensive and time consuming one for both the government and for Respondents. At the end of the day, the Commission will not ascertain any additional facts which would be relevant to the narrow decision which it is requested to make; does the Ad, on its face, constitute the functional equivalent of express advocacy? Those necessary facts are included in this response brief and Respondents respectfully request that in order to avoid unnecessary cost and time of discovery, it not be ordered for this matter.

### III CONCLUSION

The facts in this matter, without question, fail to support any proposition that the Ad constituted express advocacy or the functional equivalent of express advocacy. The facts in *Wisconsin* offered a far more compelling base upon which to make a reasonable argument that the ads at issue were an electioneering communication. However, the Court in that matter set out definitive standards that were not met by the facts in that case and by those same set of standards, it is without doubt those standards are not met in this matter.

For these reasons, Respondents respectfully request the Commission make a finding of no reason to believe and close this matter.

Respectfully submitted,



Paul E. Sullivan  
Counsel for Respondents.